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IN THE

Supreme Court of the United States

October Term, 1954

No. 367

FEDERAL POWER COMMISSION, PETITIONER

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE STATE OF MINNESOTA TO APPEAR *AMICUS CURIAE* AND ADOPT BRIEF OF RESPONDENTS

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NOW COMES the State of Minnesota, in its sovereign capacity, by Miles Lord, its Attorney General, and moves the Court for leave to appear in this cause as *amicus curiae* and in lieu of filing a brief of *amicus curiae* to adopt the briefs of the respondents filed herein.

The following is a statement of the nature of applicant's interest, the state laws involved, and the grounds on which this motion is made:

Minnesota is a land of 10,000 lakes and innumerable streams which provide a valuable tourist attraction, bringing millions of dollars a year into the State of Minnesota. Many of these waters are not adaptable to commercial navigation and are hence nonnavigable under the federal test. Yet these waters are used by the people of the State of Minnesota for sporting, agricultural, domestic and public purposes and thus constitute one of the great natural resources of the State of Minnesota. In the public interest it is imperative for the State of Minnesota to have the power to legislate and regulate in respect to the control and use of such waters and water rights where such legislation or regulation does not interfere with vested rights.

Minn. Const., Art. 2, § 2:

> "The State of Minnesota shall have concurrent jurisisdiction on the Mississippi and on all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said State, and any other state or states now or hereafter to be formed by the same; and said rivers and waters, and navigable waters leading into the same, shall be common highways and forever free, as well to the inhabitants of said State as to other citizens of the United States, without any tax, duty, impost, or toll therefor."

Minn. Const., Art. 8, § 8:

> "Any of the public lands of the state, including lands held in trust for any purpose, may, with the unanimous approval of a commission consisting of the governor, the attorney general and the state auditor, be exchanged for lands of the United States and or privately owned lands

in such manner as the legislature may provide, and the lands so acquired shall be subject to the trust, if any, to which the lands exchanged therefor were subject, and the state shall reserve all mineral and water power rights in lands so transferred by the state."

Minnesota Statutes 1953, § 105.38:

"In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public safety and welfare, it is hereby declared to be the policy of the state (1) that subject to existing rights, all waters in streams and lakes wholly within the state and such portions of all boundary streams and lakes as lie within the state, which are capable of substantial beneficial public use, shall be public waters, and shall be subject to the control of the state, (2) the state, so far as practicable, shall control the appropriation and use of surface and underground waters of the state, and (3) the state shall control and supervise, so far as practicable, the construction, reconstruction, repair, removal, or abandonment of dams, reservoirs, and all control structures in any of the public waters of the state."

§ *105.39*:

"Subdivision 1. The commissioner shall devise and develop a general water resources conservation program for the state. The program shall contemplate the conservation, allocation, and development of all the waters of the state, surface and underground, for the best interests of the people. The commissioner shall be guided by such program in the issuance of permits for the use and appropriation of the waters of the state and the construction, reconstruction, repair, removal, or abandonment of dams, reservoirs and other control structures, as provided by sections 105.37 to 105.55.

* * *

"Subd. 5. The commissioner is authorized to approve contracts for all works under sections 105.37 to 105.55, to change the plans thereof when necessary, and to supervise, control, and accept the same when complete. He is further authorized to cause the same, together with expenses incurred in connection therewith, to be paid for out of any funds made available to the use of the commissioner."

§ *105.41:*

"It shall be unlawful for the state, any person, partnership or association, private or public corporation, county, municipality, or other political subdivision of the state to appropriate or use any waters of the state, surface or underground, without the written permit of the commissioner, previously obtained upon written application therefor to the commissioner. The commissioner may give such permit subject to such conditions as he may find advisable or necessary in the public interest. Nothing in this section shall be construed to apply to the use of water for domestic purposes serving at any time less than 25 persons, or to the use of water for any purpose originating within the geographical limits of any municipality, nor to any beneficial uses and rights in existence on July 1, 1937."

§ *105.42:*

"Except in the construction and maintenance of highways when the control of public waters is not affected, it shall be unlawful for the state, any person, partnership, association, private or public corporation, county, municipality or other political subdivision of the state, to construct, reconstruct, remove, or abandon or make any change in any reservoir, dam or waterway obstruction on any public water; or in any manner, other than in the usual operation of dams beneficially using water prior to July 1, 1937, to change or diminish the course,

current or cross-section of any public waters, wholly or partly within the state, without a written permit from the commissioner previously obtained. Application for such permit shall be in writing to the commissioner on forms prescribed by him.

"The commissioner, subject to the approval of the county board, shall have power to grant permits under such terms and conditions as he shall prescribe, to establish, construct, maintain and control wharfs, docks, piers, levees, breakwaters, basins, canals and hangars in or adjacent to public waters of the state except within the corporate limits of cities or villages."

The State of Minnesota upon admission to the Union became vested with title in trust for the public to the beds of all waters then navigable and not previously granted by the United States, subject to the paramount power over such waters by the United States as a result of its power to regulate interstate commerce. *State v. Bollenbach* (1954) (Minn.) 63 N. W. 2d 278; *State v. Longyear Holding Co.*, 224 Minn. 451, 29 N. W. 2d 657; *Bingenheimer v. Diamond Iron Mining Co.*, 237 Minn. 332, 342, 54 N. W. 2d 912.

The title to the beds of waters not navigable at the time of the admission of the State of Minnesota to the Union and not previously patented remained in the United States and passed by subsequent patent to the purchaser of the riparian land unless specifically reserved in the United States by the act of conveyance. *State v. Bollenbach*, supra; *Bingenheimer v. Diamond Iron Mining Co.*, supra, *Shell v. Mattesson*, 81 Minn. 38, 83 N. W. 491.

Besides the federal test of navigability Minnesota has a state test of navigability. *State v. Bollenbach*, supra, and *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139.

The federal test of navigability is propounded in *United States v. Holt State Bank*, 270 U. S. 49, 56, 46 S. Ct. 197, 199, and is set forth in *State v. Bollenbach*, 63 N. W. 2d 278, at page 287:

> "The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had -- whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

The state test of navigability is set forth in *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, and in *State v. Bollenbach* (1954) (Minn.), 63 N. W. 2d 278 at page 287:

> ". . . Most of the definitions of 'navigability' in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see

> why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used * * * by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes * * * . To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated."

The Minnesota test of navigability has importance in situations where the State of Minnesota has conveyed to a private party riparian lands bordering a body of water nonnavigable by the federal test. See *State v. Bollenbach*, supra, at page 288.

A decision overruling the court below with respect to the sovereign power of the State of Oregon to legislate as to nonnavigable waters in the State of Oregon would establish a precedent for federal curtailment of the power of the State of Minnesota to legislate and regulate in respect to the control and use of waters and water rights as it deems necessary in the public interest in situations where there is no paramount

ederal power over such waters by virtue of the federal pow-
r to regulate interstate commerce.

Respectfully submitted,

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